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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS Trustee of the Estate of J. H. Woodward

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above cause on February 17, 1933, reversing a decision of the Board of Tax Appeals (R. 68–69).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 42–49) is not officially reported. The opinion of the

Circuit Court of Appeals (R. 66) is reported in 63 F. (2d) 621.

JURISDICTION

The judgment sought to be reviewed was entered February 17, 1933 (R. 68–69). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The facts found by the Board of Tax Appeals (R. 42–49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward who died a resident of Alabama on December 15, 1917. The will provided that the residuary estate should be held in trust and the net income therefrom after payment of a small monthly annuity to a named beneficiary should be paid as and when received to the decedent's widow and his three children or their survivors in equal shares.

The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. The widow elected to accept the provision made for her by the will.

The net income was distributed currently to the widow and three children in accordance with the terms of the will. The income thus distributed to the widow during and prior to the taxable years was less than the amount of her statutory interest in the decedent's estate. In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States* v. *Bolster*, 26 F. (2d) 760, and after the death of the widow, the Commissioner refunded the taxes thus paid, with interest.

In its return of the income of the trust, the respondent deducted the amounts distributed to the widow. The Commissioner disallowed this deduction and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions to the widow, in pursuance of her election, were distributions of income as income rather than returns of capital.

2. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow, in pursuance of the terms of the testamentary trust were deductible by the trustee.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner*, 63 F. (2d) 88. In that case a trustee was denied a deduction for annual sums paid to a widow who had renounced her dower rights. The decision was based upon the premise that the widow was a purchaser rather than a true beneficiary. The court below has reached the same result as that adopted by the Circuit Court of Appeals for the Third Circuit in *Julia Butterworth* v. *Commissioner*, *Frank Pardee* v. *Commissioner*, and *Fidelity-Philadelphia Trust Co.* v. *Commissioner*, in which the Government is also seeking certiorari, Nos. — —, October Term, 1932, respectively.[1]

[1] The reasoning upon which the decision below is based is different from that adopted by the Third Circuit. The court below has adopted the view that although the widow takes as a purchaser for value and not as a volunteer, there is merely an exchange of a legal estate for an equitable estate in an investment. The Circuit Court of Appeals for the Fifth Circuit would treat the distributions as taxable to the widow; the Circuit Court of Appeals for the Third Circuit apparently would hold them exempt altogether.

The reasons relied upon as justifying the issue of the writ are presented more fully in the petition in the *Butterworth case*, to which this Court is respectfully referred.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

> SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.
>
> * * * * *
>
> (b) Except as otherwise provided * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—
>
> * * * * *
>
> (2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * * (U.S.C., Title 26, Sec. 960.)

Section 219 (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, is

identical with Section 219 of the Revenue Act of 1924, *supra*. Section 161 (a) (2) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, is identical with Section 219 of the Revenue Acts of 1924 and 1926. Section 162 (b) of the Revenue Act of 1928 repeats, without material change, the provisions of Section 219 (b) (2) of the earlier Acts.

The Code of Alabama of 1907, Secs. 6168 and 6169 (brought forward as Secs. 10593 and 10594, Code of Alabama of 1923) provides:

> 6168. *Dissent by widow; her rights on; when dissent unnecessary.*—The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands, and such portion of the personal estate as she would have been entitled to in case of intestacy. * * *
>
> 6169. *Dissent; when to be made.*—Such dissent must be made in writing, and deposited, within twelve months from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry must be made of record, specifying the day on which the dissent was made.

U. S. GOVERNMENT PRINTING OFFICE: 1933